Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1148

THOMAS HUGHES,

Petitioner,

against

LOUIS J. FRANK, Commissioner of Police of the Nassau County Police Department, and the NASSAU COUNTY POLICE DEPARTMENT,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Table of Contents.

	Page
Citations to Opinion Below	1
Jurisdiction	2
The Question Presented	2
Constitutional Provisions, Statutes, Rules, etc., Involved	2
Statement	3
Basis for Granting the Writ	4
Conclusion	8
APPENDIX:	
Exhibit A	9
Exhibit B	11
Exhibit C	12
Exhibit D	17
Exhibit E	18

CITATIONS.

Keyishan v. Board of Regents of New York, 385 U. S. 589 (1967)	5
McGowan v. Maryland, 366 U. S. 420 (1960)	5, 6
Shapiro v. Thompson, 394 U. S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1968)	5

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No.

THOMAS HUGHES,

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LOUIS J. FRANK, Commissioner of Police of the Nassau County Police Department, and the NASSAU COUNTY POLICE DEPARTMENT,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated and entered on December 6, 1976.

Citations to Opinion Below.

The memorandum and order of the Hon. Edward R. Neaher, Judge of the United States District Court for the Eastern District of New York, dated June 2, 1976, and filed in the clerk's office on June 3, 1976, dismissing Petitioner's complaint as set forth in the appendix annexed hereto as Exhibit "C".

The judgment dated June 3, 1976, which is based upon said memorandum and order of Judge Neaher, is set forth in the appendix annexed hereto as Exhibit "B".

The determination of the United States Court of Appeals for the Second Circuit denying Petitioner's appeal from the determination of the United States District Court of the Eastern District of New York is set forth in the appendix annexed hereto as Exhibit "A".

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 6, 1976. The United States Court of Appeals for the Second Circuit by its action affirmed on the opinion of Judge Neaher, dated June 2, 1976, the order of said District Court which granted summary judgment to the Defendants therein, and dismissed the complaint of Petitioner herein.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

The Question Presented.

Whether or not Article VI, Rule 15, of the Rules and Regulations of the Nassau County Police Department as currently implemented by the Respondents is unconstitutional.

Constitutional Provisions, Statutes, Rules, etc., Involved.

The constitutional provision involved is the equal protection clause of the 14th Amendment of the United States Constitution and Article VI, Rule 15, of the Nassau County Police Department. The above constitutional provision as well as Police Department Rule and Regulation are set forth in the appendix annexed hereto as Exhibits "D" and "E", respectively.

Statement.

Petitioner is a police officer employed by the County of Nassau, State of New York, and continues in that capacity to date.

That, prior to becoming a member of the Nassau County Police Department, the Petitioner completed a four-year tour of active duty with the United States Navy, having received an honorable discharge therefrom as well as satisfactorily fulfilling a period of time in the inactive reserves.

Petitioner currently seeks to become a member of an authorized Naval reserve unit, Petitioner being able to retain the rank of "E-5" if Petitioner is able to effectuate said affiliation on or before May, 1976.

Pursuant to, and in accordance with, Article VI, Rule 15, of the Rules and Regulations of the Nassau County Police Department, the text of which is set forth, in the annexed appendix as Exhibit "D", Respondents have refused to grant to Petitioner permission to join said Naval reserve unit, although Petitioner has duly sought permission from Respondents.

Respondents have, in the papers filed below, admitted that they have placed a 100-man limit upon those members of the Nassau County Police Department who, at any one time, can be members of a military reserve force.

It is this arbitrary setting of a 100-man limit as well as the rule and regulation itself upon which Respondents attempt to base credence for their actions that Petitioner challenges in these proceedings.

Petitioner challenged the actions of Respondents by the institution of a lawsuit in the Federal District Court for the Eastern District of New York alleging the violation of his constitutional rights, said proceedings being terminated adversely as to Petitioner. Petitioner appealed said adverse decision to the United States Court of Appeals for the Second Circuit, said Court affirming the District Court determination. It is from said Second Circuit Court of Appeals determination that Petitioner does herein seek, by way of a writ of certiorari, the right to appeal said determination to the United States Supreme Court.

Basis for Granting the Writ.

This Petition raises substantial and important questions concerning the right of an individual to participate in this Nation's military reserve program that should be recognized and protected by the equal protection clause of the 14th Amendment to the United States Constitution, as well as a broader policy question which could have a profound effect upon this Country's national security as related to this Country's capability to supplement the standing army's military manpower capabilities by utilization of military reserve units in cases of national emergency.

As previously set forth, Petitioner sought to join an active military reserve unit while employed as a Nassau County Police Officer, only to be denied the opportunity based upon Respondent's policy that no more than 100 police officers out of a force of over 3,800 could, at any one time, participate in any such program.

Although Respondents have attempted to justify their actions by stating that they fall within the "rational basis test" as enunciated by the Supreme Court in *McGowan v. Maryland*, 366 U.S. 420 (1960), Petitioner respectfully submits that in the first instance said "rational basis test" should not be the criteria upon which to judge Respondents' actions herein, and, secondly, should this court feel otherwise, Respondents' actions do not even fall within said "rational basis" criteria.

Petitioner respectfully submits to this court that the denial to Petitioner of his 14th Amendment right to equal protection should be reviewed by this court, under the facts and circumstances as herein presented, as a violation of fundamental constitutional guarantees.

In *Shapiro v. Thompson*, 394 U. S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1968), it was held that, when it came to fundamental constitutional rights, a governmental entity could not prohibit or place a "chilling effect" upon the exercise of said fundamental constitutional rights unless there could be demonstrated that a compelling governmental interest would be promoted. In *Shapiro v. Thompson, supra*, the court stated:

> "• • • appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional • • •"

In addition to expounding this "compelling governmental interest" doctrine as a justification for permitting some limitations to be placed upon the exercise by governmental employees of fundamental constitutional rights, the court in *Keyishan v. Board of Regents of New York*, 385 U. S. 589 (1967), specifically limited this doctrine

such that, even if there can be demonstrated that there is a compelling governmental interest to promote, that interest must be promoted by narrowly drawn legislation which will have the least effect upon the exercise of the fundamental constitutional right in issue.

It is based upon the above that Petitioner respectfully submits to this court that, under the facts and circumstances as herein presented, Respondents' implementation of Article VI, Rule 15, falls within the category of conduct that violates Petitioner's constitutional guarantees of equal protection and should not be condoned or tolerated by this court.

In the alternative, if this court should feel that the "rational basis test" as enunciated in *McGowan v. Maryland, supra,* is the proper criteria under which Respondents' conduct should be evaluated, then Petitioner respectfully submits to this Court that Respondents' actions do not in fact meet said criteria.

By Respondents' own acknowledgment in the prior proceedings, the arbitrary setting of the 100-man limit as to Nassau County police officers who can participate at any one time in an active military reserve capacity in effect reduces the man power level of the Nassau County Police Department by 15 men per year (affidavit of Louis J. Frank, p. 2, lines 11-14 submitted in the District Court). When this 15-man figure is compared to the fact that there are over 3,800 police officers in the Nassau County Police Department, it becomes readily apparent that the 100-man limit reduces the police force by 2.6%, a truly insignificant amount, assuming said police officers utilize the full 30 days of reserve training provided as the maximum under statute. Certainly, for Respondents to take the position that the setting of the 100-man limit, which

means a reduction in the police force in personnel available over a year's period of a maximum of 2.6%, is certainly not worthy of this court's stamp of approval as meeting the "rational basis" criteria as set forth by this court when dealing with the infringement of an individual's constitutional guarantees.

The significance of the above referenced statistical factor when viewed in the context of a 3,800 plus Police Department can further be highlighted when it is realized that, under the current Patrolmen's Benevolent Association contract, a member of the Police Department can take one complete day off by donating a pint of blood, the approximate number of days given off by the Police Department in 1975 being in excess of 1,600 man days. Petitioner respectfully submits to this court that participating in the military reserves of this Country should certainly be a comparable meritorious act as that of giving blood and nowhere is Petitioner aware of Respondents attempting to limit the number who can participate in said blood donation program.

In addition to the above, members of the Police Department are given a day off if they do not utilize any sick leave within a year's period and men are additionally given days off as a reward for receiving meritorious commendations.

With the above as background, the statistical as well as the monetary justification which the District Court based its determination upon and which the Second Circuit Court of Appeals approved should be scrutinized when considering the infringement of Petitioner's constitutional guarantees as is herein the case as well as the profound effect that such a determination can have upon reserve recruitment.

If the District Court determination is allowed to stand, it is respectfully submitted that any employer will be able to deny to an individual the right to initiate participation in an active military reserve unit merely by saying that such participation would possibly reduce said employer's work force by a percentage as low as 2.6%, and that said denial could legally be upheld citing Judge Neaher's decision in this matter.

For the reasons stated above, this court should determine that Article VI, Rule 15, of the Rules and Regulations of the Nassau County Police Department as currently implemented by the Respondents is in fact unconstitutional.

Conclusion.

For the reasons stated above, Petitioner respectfully submits that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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HARTMAN & ALPERT,
Of Counsel.

APPENDIX.

Exhibit A.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of December, one thousand nine hundred and seventy-six.

Present:

Hon. Leonard P. Moore,
Hon. Wilfred Feinberg,
Hon. Murray I. Gurfein,
Circuit Judges,

THOMAS HUGHES,

Plaintiff-Appellant,

against

LOUIS J. FRANK, Commissioner of Police of the Nassau County Police Department, and the NASSAU COUNTY POLICE DEPARTMENT,

Defendants-Appellees.

76-7337

Appeal from the United States District Court for the Eastern District of New York;

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion of Judge Neaher, dated June 2, 1976.

LEONARD P. MOORE
WILFRED FEINBERG
MURRAY I. GURFEIN
Circuit Judges

Exhibit B.

Judgment Dismissing Complaint Appealed From.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

THOMAS HUGHES,

Plaintiff,

against

LOUIS J. FRANK, Commissioner of Police of the Nassau County Police Department, and the NASSAU COUNTY POLICE DEPARTMENT,

Defendants.

75-C-1983

A memorandum and order of Honorable Edward R. Neaher, United States District Judge, having been filed on June 3, 1976, granting summary judgment and dismissing the complaint pursuant to Fed.R.Civ.P. 12(c) and directing the Clerk to enter judgment for the defendant and against the plaintiff, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant and the complaint is dismissed.

Dated: Brooklyn, New York
June 3, 1976

LEWIS ORGEL
Clerk

Exhibit C.

Memorandum and Order by Neaher, D. J., Granting Defendants' Motion to Dismiss Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

THOMAS HUGHES,

Plaintiff,

against

LOUIS J. FRANK, Commissioner of Police of the Nassau County Police Department, and the NASSAU COUNTY POLICE DEPARTMENT,

Defendants.

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75 C 1983

Appearances:

Hartman & Alpert, Esqs., Attorneys for Plaintiff, By Allen R. Morganstern, Esq.

James M. Catterson, Jr., Esq., County Attorney of Nassau County, Attorney for Defendants, By James N. Gallagher, Esq., Deputy County Attorney.

NEAHER, District Judge.

Plaintiff Thomas Hughes, a police officer employed by the Nassau County Police Department, brought this action under the Civil Rights Act, 42 U.S.C. §1981, *et seq.*, and Section 9 of the Military Selective Service Act of 1967, 50 U.S.C. App. §459, seeking a declaration that Article VI, Rule 15 of the Rules and Regulations of the

Nassau County Police Department ("Rule 15") is unconstitutional. He claims that Rule 15 denies him the equal protection of the laws by arbitrarily barring him from membership in a federal military reserve organization. Defendants have moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. F.R.Civ.P. 12(b) (1) and (6).

The complaint alleges that prior to his police employment, plaintiff completed a four-year tour of active duty with the United States Navy, received an honorable discharge and satisfactorily fulfilled a period of time in the inactive reserves. He now desires to join an authorized Naval Reserve Unit and has requested defendants' approval to affiliate. His request has been refused based on defendants' interpretation of Rule 15, which provides:

> A member of the Force or Department is prohibited from affiliating with any organization or body, the constitution or regulations of which would in any way exact prior consideration, and prevent him from performing his departmental duties; and he shall immediately advise the Commissioner of Police of any change in his classification in relation to Selective Service, or status concerning his membership in any Federal or State military organization or reserve program.

Plaintiff further alleges defendants advised him, at the time of his request, that their policy under the Rule was to limit the number of police officers in the reserves to 100, that the quota already had been met, and that plaintiff would have to wait his turn. No allegation has been made that defendants' refusal of permission was activated by any personal or class-based discriminatory animus.

The Police Commissioner's affidavit in support of the motion to dismiss states that the purpose of Rule 15 is to secure the performance of the police force's primary obligation, service to the citizens of Nassau County. The Police Commissioner avers that the County incurs a substantial loss of services as a result of the time each reservist spends on reserve duty. A reservist is entitled to military leave, with pay, for up to 30 days each year. Even with the present quota of 100, it is calculated, Nassau County loses 3,000 man days of police services per year, equivalent to a reduction of the force by 15 men, at a yearly cost of $400,000. Defendants also emphasize the County's tight fiscal situation by pointing out that a hiring freeze currently is in effect and no temporary officers can be hired to fill the gap.

Plaintiff challenges these economic considerations, asserting that the present loss in manpower is statistically insignificant when compared with the total police personnel, over 3,800 officers. Plaintiff also contrasts other known losses in police manpower not so circumscribed, *e. g.*, days off for donating blood, not using sick leave and receiving meritorious commendations, and concludes that no rational basis for the Rule has been shown.

The controlling question here, however, is not whether the police department can afford to let plaintiff join the Naval Reserve but whether it is constitutionally obliged to do so. The answer to that question turns upon whether Rule 15 amounts to an arbitrary restriction upon a fundamental right of plaintiff as a public employee, see *Shapiro v. Thompson*, 394 U.S. 618 (1968), or has a rational relation to a valid State objective, see *McGowan v. Maryland*, 366 U.S. 420 (1960).

Rule 15 is not free from ambiguity on its face with respect to a prohibition on "membership in any Federal or State military organization or reserve program," especially in view of the acknowledged permissible quota of officers who may participate in such a program. Nor does the Rule expressly confer the quota power exercised.

There is no dispute, however, that defendants interpret the Rule to mean, first, that before a police officer may join a military reserve unit, he must obtain the permission of the police commissioner. An officer's affiliation without such approval could result in charges being brought against him for violating police department rules and regulations. The Police Commissioner, secondly, interprets the Rule to give him the authority to impose a quota on the number of police officers entitled to serve in the military reserves at any one time. Accordingly, the constitutionality of the Rule must be judged by the manner in which it is applied. See *Broadrick v. Oklahoma*, 413 U.S. 601, 617-18 (1973); *Law Students Research Council v. Wadmond*, 401 U.S. 154, 162-63 (1971); *Schwartz v. Romnes*, 495 F.2d 844, 852 (2 Cir. 1974).

Plaintiff here is basically seeking to hold his police employment while demanding the right to be free of a regulation that prevents his participation in activities which conflict with the performance of his police obligations. It would appear to be undeniable, as defendants contend, that the County's interest in maintaining an adequately staffed police force to insure the public safety and enforcement of the laws overrides any interest an individual police officer may have in joining the reserves. The Commissioner's concern over loss of manpower due to the number of enlistments in the military reserves is clearly legitimate and the quota system established to deal with the problem cannot be considered irrational or arbitrary. Nor can it be said that the Commissioner exercises standardless discretion in permitting or refusing affiliation with a reserve unit, his power being limited, as it is, to implementing the quota system. That system, moreover, is manifestly a reasonable accommodation between the County's interest in conserving its police manpower and the national interest in training military reservists for possible defense needs.

Plaintiff's challenge to Rule 15 rests upon an assumption the court cannot accept. As one federal court recently put it, "[c]ourts have never seen fit to declare that the right to seek employment, unfettered by government regulation, is fundamental, and in fact, courts have consistently refused to employ this strict compelling interest standard for purely economic matters." *Habron v. Epstein,* F. Supp. , 44 U.S.L.W. 2517 (D. Md. April 6, 1976) (three-judge court). Public employees such as plaintiff cannot expect "that the claim of a member of a uniformed civilian service based on the 'liberty' interest protected by the Fourteenth Amendment must necessarily be treated for constitutional purposes the same as a similar claim by a member of the general public." *Kelley v. Johnson,* U.S. , 96 S. Ct. 1440, 1446 (1976). On the undisputed facts before the court, it is plain that plaintiff will be unable to demonstrate "that there is no rational connection between the regulation, based as it is upon [defendant's] method of organizing its police force, and the promotion of safety of persons and property." *Id.* at , 96 S. Ct. at 1446.

The court having considered the affidavits of the parties on defendants' motion, summary judgment is granted dismissing the complaint. Rule 12(c), F.R.Civ.P.[1]

So Ordered.

The Clerk of the Court is directed to enter judgment in favor of the defendants and against the plaintiff dismissing the complaint.

Dated: Brooklyn, N. Y.
June 2, 1976.

EDWARD R. NEAHER
U. S. D. J.

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[1]Plaintiff's claim of denial of equal protection of the laws in violation of the civil rights statute, 42 U.S.C. §1981, *et seq.*, is sufficient to invoke federal jurisdiction under 28 U.S.C. §1343, in this action for declaratory relief. See *Wood v. Strickland,* 95 S. Ct. 992 (1975). See also *Kurlan v. Callaway,* 510 F. 2d 274 (2 Cir. 1974).

Exhibit D.

United States Constitution

Amendment XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Exhibit E.

Nassau County Rules & Regulations

Article VI—

Rule 15. A member of the Force or Department is prohibited from affiliating with any organization or body, the constitution or regulations or which would in any way exact prior consideration, and prevent him from performing his departmental duties; and he shall immediately advise the Commissioner of Police of any change in his classification in relation to Selective Service, or status concerning his membership in any Federal or State military organization or reserve program.

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Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Table of Contents.

Page

Argument in Opposition to Granting Writ of Certiorari 1

Conclusion 5

TABLE OF CASES

Page

Shapiro v. Thompson, 394 U.S. 618, 22 L.Ed. 2d 600, 89 S.Ct.1322 (1969) 2

Habron v. Epstein ——— F. Supp ———, 44 L.W. 2517 (DC Md.1976) 2

McGowan v. Maryland, 366 U.S. 410, 6 L.Ed. 2d 393 3

Kelley v. Johnson, ——— U.S. ———, 47 L.Ed.2d 708, 96 S.Ct. ———(1976) 4

Petitioner's initial contention is that Rule 15 violates a "fundamental right" without serving a "compelling governmental interest". *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 8 S.Ct. 1322 (1969). Petitioner's contention is without merit. Participation in a military reserve program has never been held to be a fundamental right. Those rights which are protected by the Constitution as fundamental are basic human rights, rights very distinct from that which Petitioner asserts. As one federal court recently observed "Rights found to be fundamental include the right to procreate, the right not to procreate, the right to vote, freedom from incarceration due to indigency, the right to travel and certain criminal procedures". *Habron v. Epstein* _____ F. Suppl. _____, 44 L.W. 2517, (D.Md.1976) _____ Clearly, if there is a constitutional right to participate in the Naval Reserve, it is not of sufficient magnitude to require constitutional protections traditionally afforded to rights which are fundamental in nature.

If, however, the right to participate in military reserve programs is fundamental in nature, Petitioner's constitutional attack on Rule 15 must nevertheless fail, because Respondent demonstrated that the Rule serves a compelling governmental interest in that Respondent's responsibility is to guarantee an increasing population of Nassau County as effective police protection as possible. The Rule serves by providing a means through which the police force can minimize loss of manpower and the County can minimize the financial loss which might otherwise be incurred as the result of an unlimited number of police officers participating in the military reserve.

At present, the Rule is implemented by Respondent so as to allow a maximum of one hundred (100) police officers to participate in military reserve programs at one time. Even with this quota, Nassau County suffers a loss of three thousand (3,000) man days of police services per year. This is the equivalent of a fifteen man reduction in the size of the police force. In addition, participants in reserve programs are entitled to up to thirty (30) days of leave per year with pay from their regular jobs in order to pursue military reserve activities. This practice costs Nassau County an estimated $400,000 per year. The consequences to the County due to this personnel and monetary loss is particularly severe because of fiscal difficulties which the County is experiencing and a hiring freeze which prohibits the County from employing temporary personnel who theoretically supplement manpower lost to the military reserves.

Clearly, there is a compelling governmental interest in promulgating a rule which limits the number of police officers who may participate in military reserve programs at any one time.

Petitioner's alternative contention is that if there is no fundamental right to participate in the military reserves, there is, nonetheless, one of constitutional dimension, and that Rule 15 infringes this right without satisfying the "rational basis test" set forth in *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed. 2d 39.

This contention is also without merit. The Rule finds its rational basis in respondent's obligation to adequately protect the people of Nassau County by minimizing loss of police manpower. Since it can be demonstrated that the participation of one hundred (100) police officers in military reserve programs is detrimental to residents of the County, Respondent, as heretofore stated, has clearly implemented the Rule through the least restrictive means possible. Rule 15 serves a compelling government interest. Certainly a rule which survives strict scrutiny satisfies the rational basis standard.

Furthermore, the right which Petitioner asserts is the right to be given precisely the same opportunity to participate in the military reserves as is given an employee in the private sector. Petitioner, however, is not such an employee. He is a police officer whose employer has "in accordance with its well-established duty to keep the peace, placed a myriad of demands upon the police force, duties which have no counterpart with respect to the public at large." *Kelley v. Johnson*, ———U.S.———, 47 L.Ed. 2d 708, 96 S.Ct.——— (1976). One of the demands placed on Petitioner as a Nassau County police officer is that he abide with the rules designed to regulate the number of police officers serving in the reserves at one time, a rule which Petitioner was well aware of when he initially accepted employment, and agreed to comply with upon acceptance of such employment by the Police Department.

In light of the foregoing, it is evident that Petitioner's constitutional attacks on Rule 15 are without merit and it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Conclusion.

For the reasons stated above, the petition herein should be denied in all respects.

Respectfully submitted,

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